COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

PARAGON RESIDENTIAL PROPERTIES, LLC, Appellant	)	
v.	)	No. 04-16
BROOKLINE ZONING BOARD OF APPEALS, Appellee	)	

RULING ON PREHEARING MOTIONS

This is an appeal pursuant to G.L. c. 40B, § 22, and 760 CMR §§ 30.00 and 31.00, brought by Appellant Paragon Residential Properties, LLC (Paragon) of a decision of Appellee Brookline Zoning Board of Appeals granting a comprehensive permit with conditions with respect to property located at 45 Marion Street, Brookline. Three issues have been raised by motion. The Board has moved to dismiss this appeal alleging Paragon had not satisfied the jurisdictional requirement of site control specified in 760 CMR 31.01(1)(c) and (2). Paragon has moved for a determination that a comprehensive permit has been constructively granted, or in the alternative, that the Board's decision is in effect a denial of a comprehensive permit. In addition, an abutter, Jonathan Davis (Mr. Davis), has moved to intervene in the appeal.

I. PROCEDURAL HISTORY

On October 14, 2003, Paragon submitted an application to the Board for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23, for an 88-unit residential condominium development on 15,036 square feet of land located at 45 Marion Street,

Brookline, Massachusetts. Of the 88 units initially proposed, 22 would be offered as affordable. The plan was revised to provide for 68 total units, including 19 affordable units. The housing is to be subsidized by either the Massachusetts Housing Finance Agency under the Housing Starts Program or the New England Fund Program of the Federal Home Loan Bank of Boston.

The public hearing began on November 6, 2003, and continued on December 4 and 18, 2003, and on March 18, April 22, May 20 and June 10, 2004. A site visit was held on December 21, 2003. Paragon requested that the hearing be closed on May 20, 2004. The Board denied that request. On May 20, 2004, the Board issued an order stating that site control appeared to be deficient and ordering Paragon to provide "suitable and persuasive" evidence of site control within 60 days; otherwise the Board would dismiss the case or, alternatively, include site control as a factor in its decision. The Board closed the hearing on June 10, 2004, and deliberated on the application on June 17, 2004. On June 17, counsel for Paragon agreed that the Board could file its decision on or before July 9, 2004. On July 5, 2004 the Board issued its decision granting a comprehensive permit with conditions.

Among its findings, the Board determined that: 1) Paragon is substantially related to an entity known as Marion Properties Group, LLC (Marion Properties), which is the present owner of the Property; 2) Paragon proposes to purchase the property through a non-arm's length transaction; 3) Marion Properties and other parties are prohibited by a temporary restraining order (TRO) from conveying or encumbering the property; 4) the TRO prohibits the purchase "that would enable [Paragon] to claim site control;" 5) the comprehensive permit, as an encumbrance on the property is prohibited by the TRO; 6) Paragon has failed to satisfy the jurisdictional prerequisite of site control, and thus the Board does not have jurisdiction over the

permit application; 7) the Board gave Paragon a formal notice of this finding and provided Paragon sixty days to cure; and 8) Paragon has failed and refused "to cure this clear jurisdictional defect."

In addition, the Board's decision granting the Comprehensive Permit included as Condition 1:

> This Permit shall be ineffective unless, within sixty days from the Board's May 20, 2004 order (i.e. July 19, 2004), the Applicant submits suitable and persuasive evidence that it has established control of the site, as required by 760 CMR 31.01(1)(c). With submission of such evidence, the Applicant must request that the Board re-open the hearing, in compliance with all notice requirements to consider the Applicant's submissions. In the event that the Applicant does not provide evidence of site control by July 19, 2004, this permit shall be null and void.

On July 22, 2004, Paragon filed its appeal with the Housing Appeals Committee. On August 3, 2004, Mr. Davis moved to intervene in the appeal. The Committee held a Conference of Counsel on August 9, 2004.[1] On August 23, 2004, the Board moved to dismiss, alleging Paragon had not satisfied the jurisdictional requirement of site control. On September 10, 2004, Paragon filed a motion for a determination that a comprehensive permit has been constructively granted, or in the alternative, a motion for a ruling that the Board's decision is a *de facto* denial. Oppositions have been submitted to each motion, and the Board and Mr. Davis have filed replies to the oppositions filed by Paragon.

II. MOTION TO DISMISS

To be eligible to proceed on a comprehensive permit application before a zoning board, or to bring an appeal before the Housing Appeals Committee, an applicant must fulfill three jurisdictional requirements, including that "[t]he applicant shall control the site." 760 CMR 31.01(1)(c). Paragon has entered into a purchase and sale agreement with Marion Properties

1. The Committee's Chairman, Werner Lohe, has recused himself from this proceeding. The Committee's Counsel, Glenna J. Sheveland, presided at the Conference of Counsel.

with respect to the subject property. Paragon asserts that, according to 760 CMR 31.01(3), the agreement is "conclusive evidence of [its] interest in the site." It relies on 31.01(3) to argue that the MassHousing site approval letter also provides conclusive evidence of its interest in the site.

The Board claims that Paragon failed to establish it controls the site because the Superior Court has issued a TRO against Marion Properties and other defendants in a civil action, thus rendering Paragon's purchase and sale agreement ineffective. The Board claims that the TRO precludes a showing of site control either at the time of the application or within 60 days after notification of a deficiency as provided in 760 CMR 31.01(5), which it claims is the critical time period for jurisdictional purposes.[2]

The existence of Paragon's purchase and sale agreement creates a rebuttable presumption of "site control" within the meaning of 750 CMR 31.01(1)(c). Holding an "option or contract to purchase the proposed site" constitutes conclusive evidence of an applicant's interest in the site, 760 CMR 31.01(3), which in turn gives rise to a rebuttable presumption that an applicant has demonstrated site control for the purposes of G.L. c. 40B. 760 CMR 31.07(1)(b).[3] Absent evidence to the contrary, this agreement is sufficient to require the Committee to presume that Paragon controls the site. To counter that presumption, it was incumbent on the Board to submit contrary evidence in rebuttal. See *TBI, Inc. v. Board of Health of North Andover,* 431 Mass. 9, 12, 725 N.E. 2d 188 (2000).

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2. Although the Board cites 760 CMR 31.01(2) in support of dismissal, it makes no argument on that basis in its initial or reply memorandum.

3. There is no need to reach the question whether the MassHousing site approval letter gives rise to a separate basis for the presumption.

The only evidence submitted was the TRO, without the underlying complaint. On the face of the TRO, Marion Properties is temporarily enjoined from conveying the property to Paragon. There is no indication whether the litigation involves a question of ownership of the property or simply concerns other issues for which the defendants are bound to retain assets pending the course of the suit.[4] There is no evidence that the temporary order will turn into a permanent order. The fact that Marion Properties is, at this time, prohibited from conveying to Paragon does not invalidate the agreement, which states that performance shall be no later than December 31, 2005, and provides for a 30-day extension beyond that date to perfect title. The existence of this TRO, without more, is insufficient to rebut the presumption of site control arising from the agreement.[5] *Stanley Realty Holdings, LLC v. Watertown Zoning Bd. of Appeals, et al.,* Misc. No. 293271 (Mass. Land Ct. July 21, 2004) does not require a different result. There the Land Court focused on questions of a leasehold interest supporting site control and also found that the memorandum of understanding submitted by the developer failed to contain all material terms including a sufficiently specific description of the location of the site. See *id.* at 8-10. Those deficiencies are not present here. The agreement is also *prima facie* evidence of site control. See *Mountain Street, LLC v. Sharon,* No. 04-01, slip op. at 4 (Housing Appeals Committee Ruling Sept. 24, 2004). Nor does the TRO render Paragon's application moot, as the Board suggests, relying on *Parker v. Black Brook Realty Corp.*, 61 Mass. App. Ct. 308, 311, 809 N.E. 2d 1086 (2004). The decision in *Parker,* permitting a

4. Paragon alleges, but submitted no evidence, that the complaint is in the nature of a partnership dispute involving eight properties including the site involved here and seeks an accounting of funds of the entity defendants, among other things.

5. There is no support for the Board's assertion that Paragon's two unsuccessful attempts to obtain relief from the TRO constitute a tacit admission that the TRO precludes a determination that it controls the site within the meaning of 760 CMR 31.01(1)(c).

planning board to require proof of land ownership for a subdivision application, does not apply to G.L. c. 40B cases and does not support the Board's contention.

The Supreme Judicial Court has provided guidance on this issue in *Hanover v. Housing Appeals Committee,* 363 Mass. 339, 377-78, 294 N.E.2d 393 (1973). In *Hanover,* the court considered the statute, and took a practical, rather than a hyper technical, view of a developer's potential interest in a site. See *id.* at 377. The court noted that the statute "does not explicitly state the requisite property interest necessary to qualify as an applicant for a comprehensive permit, and ruled that the statute does not require an applicant to establish present title. *Id.*

The Board also argues that changes to 760 CMR 31.00 make "site control" an express jurisdictional requirement, setting forth a more stringent standard for a developer to meet. In 1991, 760 CMR 31.00, *et seq*. was amended to include express jurisdictional requirements, and to identify evidence in 760 CMR 31.01(3) that establishes a rebuttable presumption. 760 CMR 31.07(1)(b). Although the rebuttable presumption provision of 31.07(1)(b) and the "conclusive evidence" language of 31.01(3) could have been drafted more clearly, this amendment provided that the evidence of an agreement, rather than being conclusive, may be rebutted.

To the extent the Board argues that the term "site control" in 760 CMR 31.01(1)(c) established a higher threshold for developers than the language "interest in the site" found in 760 CMR 31.01(3), it is mistaken. The regulatory changes must be read in light of the remarks in *Hanover* that the site control requirement protects against the "possibility of frivolous applicants who have no present or potential property interest in the site." *Id.* at 378 n. 25. See also *Delphic Associates, LLC v. Middleborough*, No. 00-13, slip op at 5 (Housing Appeals Committee July 17, 2002). Moreover, the *Hanover* court stated that "the Legislature intended to define the requisite property interest for a permit in terms of the selected financing agency's

property interest requirements." *Id.* at 377. Accord *An-Co, Inc. v. Haverhill,* No. 90-11, slip op. at 10 (Housing Committee June 28, 1994) ("[s]ite control ... is a matter that is primarily of concern only to the subsidizing agency").

The Board may require full disclosure of an applicant's present or planned property interest, and look behind the purchase and sale agreement. See *Hanover* at 378; 760 CMR 31.01(1)(c). However, allegations or evidence that the Paragon principals are defendants in the Superior Court action, and that they failed to bring the TRO to the Board's attention, without more, are not sufficient evidence to rebut the presumption created by the agreement. Nor may the Board assume the responsibility that lies with the subsidizing agency, which is expected to conduct a thorough review of the site before final subsidy approval is given immediately before construction and to withhold final approval and authorization to begin construction until the developer establishes definitively that it controls the site. See *An-Co,* slip op. at 10-11. Here, a significant number of hurdles, including the conditions imposed in the comprehensive permit and whether the comprehensive permit remains in force, preclude Paragon from acting on the development plan at present. For this reason, the concerns raised that future recording of the comprehensive permit, deed riders and the regulatory agreement would work as potential encumbrances upon the property, or impair fundability or defeat the characterization of Paragon as a limited dividend organization are misplaced. As *An-Co* notes, questions about ownership of the land can be resolved before construction by imposition of a condition imposed on the comprehensive permit. See *id.* at 11. Mr. Davis' argument that this appeal should be dismissed because Paragon failed to comply with the Board's order that it cure the alleged

failures in site control similarly fails.[6] For the reasons stated above, these arguments are without merit.

Accordingly, the Board's motion to dismiss is hereby denied.

III. MOTION TO INTERVENE

The Housing Appeals Committee's standards for intervention, located at 760 CMR 30.04(2), provide that to intervene as a party in the whole or in any portion of the proceedings before the Committee, Mr. Davis must show that he will be substantially and specifically affected by the outcome of the proceedings before the Housing Appeals Committee and specifically that his harm would be related to the granting of relief from local regulation as requested by the developer in this appeal, that his harm is not a common harm which is shared by all the residents of the Town, and that the Board will not diligently represent those interests. *Weston Development Group v. Hopkinton,* No. 00-05, slip op. at 6-7 (Housing Appeals Committee May 26, 2004). "In determining whether to permit a person to intervene, the presiding officer shall consider only those interests and concerns of that person which are germane to the issues of whether the requirement and regulations of the city or town make the proposal uneconomic or whether the proposal is consistent with local needs." 760 CMR 30.04(2).

In his memorandum, Mr. Davis alleges that he is particularly concerned with the design of the proposed building, the density of the proposed development, and its impacts on air quality, light and shadows, traffic and open space. This initial allegation, without more, is not specific as to any direct impact upon Mr. Davis. Had Mr. Davis limited his request to his initial motion, rather than adding specific allegations in his reply memorandum, his request to intervene would have failed. However, in his reply memorandum, Mr. Davis raises specific

6. As noted, *infra,* this argument is beyond the scope of an intervener's participation.

factual allegations: that he will have an unimpeded view of the proposed structure from at least three rooms within his condominium unit on Park Street, and that the structure will block sunlight and air from entering the windows in these three rooms.

Mr. Davis also alleges that the Board doesn't share his interests because it granted a permit with conditions, including a reduction in height from 12 to eight stories, rather than denying the comprehensive permit. In its decision, the Board expressed its own concern about the impact of the proposed building on access to light and air in adjoining properties, and required additional setbacks to address this concern. It noted in particular an adverse impact on 49 Marion Street, but did not mention Mr. Davis' building. Because Mr. Davis argues that the Board should have denied, rather than granted, the comprehensive permit I conclude that the Board will not represent his interests sufficiently.

Accordingly, Mr. Davis has made sufficient specific factual allegations to entitle him to participate as an intervener. I hereby grant Mr. Davis' motion in part. Through counsel, Mr. Davis may participate in the hearing as an intervening party, but his participation is strictly limited to those matters by which he is substantially and specifically affected as he has specifically alleged. He may participate with regard to his allegation that the proposed structure will block sunlight and air from entering the windows of his condominium. He may not participate with regard to matters of concern to the residents of the neighborhood generally or matters of concern to the town generally, including jurisdictional issues.[7] Nor may he participate with regard to financial, programmatic, or monitoring concerns, which are within the province of the Board or the subsidizing agency.

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7. Mr. Davis' argument that the Board's decision did not address all jurisdiction issues that he believes should be raised is beyond the proper scope of an intervener's role.

IV. MOTION FOR DETERMINATION OF CONSTRUCTIVE GRANT OR *DE FACTO* DENIAL

Paragon moves for a determination by the Committee that the Board constructively grant a comprehensive permit on the ground that the Board has not rendered a decision in this matter.[8] It contends that since the decision, by its own terms, became null and void in the event Paragon did not provide "suitable and persuasive" evidence of site control by July 19, 2004, the decision does not exist. It argues further that it could not obtain financing based on this decision. The Board argues in response that the Committee has no authority under Chapter 40B to issue constructive grants and that its actions were timely.[9] Alternatively, Paragon argues that the Board's decision is in effect a denial because the 16 conditions, taken together, require it to redesign the project. The Board asserts that its required changes do not contemplate a radical reduction in the number of units and that exhaustive findings support the required project alterations.

A. Constructive Grant

Chapter 40B does not explicitly give the Committee the authority to rule on a claim of constructive grant of a comprehensive permit. Section 22 of the statute provides that: "[w]henever an application [for a comprehensive permit] is denied, or is granted with… conditions…, the applicant shall have the right to appeal to the housing appeals committee… for a review of the same." Later provisions of § 22 variously refer to an "appeal" or a "petition for review" to the Committee. The constructive grant provision relied upon by Paragon is in G.L. c. 40B, § 21.

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8. Paragon moved for leave to amend its motion for a determination of a constructive grant by withdrawing its argument that the Board's decision was not rendered within forty days of the close of the hearing. See G.L. c. 40B, § 21. That motion is granted.

9. Mr. Davis' arguments in opposition to Paragon's motion regarding a constructive grant are beyond the scope of his intervention.

In ruling on the question of a constructive grant in another proceeding, the Committee quoted from the Supreme Judicial Court's decision in *Student No. 9 v. Board of Educ.*, 440 Mass. 752, 762-63, 802 N.E. 2d 105 (2004) which stated that "[a]n administrative agency … has considerable leeway in interpreting a statute it is charged with enforcing, and regulations adopted by the agency stand on the same footing as statutes, with reasonable presumptions to be made in favor of their validity." See *Mountain Street,* slip op. at *5*. The Committee has interpreted § 22 of the statute as establishing jurisdiction for it to review and determine whether an application has been granted constructively due to failure of the Board to meet one of the deadlines in § 21. This interpretation has been formally adopted as 760 CMR 31.08(8). *Mountain Street,* slip op. at 5.

Here, the Board acted on Paragon's application and issued a written decision. Characterizing the decision as null and void does not alter the fact that the Board rendered a decision. Compare *Mullin v. Planning Bd. Of Brewster,* 17 Mass. App. Ct. 139, 144, 456 N.E. 2d 780 (1983) (constructive grant of special permit under G.L. c. 40A would be appropriate only when board failed to take final action within required time period; subsequent invalidation of board's vote has no effect on finality of board's action). Similarly, in *Archstone Communities Trust v. Woburn,* No. 01-07, slip op. at 9 (Housing Appeals Committee June 11, 2003), the Committee determined that where the board had voted on the appellant's Chapter 40B application within 40 days after termination of the hearing, the delay in issuing the written decision did not require a finding of a constructive grant under G.L. c. 40B, § 21. Here there is no question that the Board has made a final decision on the application within the required time period. Accordingly, Paragon's motion for a determination of a constructive grant is hereby denied.

B. *De Facto* Denial

Paragon further argues that the Board's decision should be treated as a denial of a comprehensive permit, requiring the application of the burdens set out in 760 CMR 31.06(2) and (6). It argues that the reduction in building height and the requirement of redesign of the building and other conditions as set forth in the Board's decision demonstrate that the decision is not an approval of the project as proposed, but is instead an attempt by the Board to design an alternate project.

Paragon points in particular to Condition 2, which requires that the project not exceed eight stories, rather than the 12 stories described in the application. Condition 2 also requires a "substantially narrower above-grade building width" and requires Paragon to address "unreasonable encroachment into side yard setbacks." Moreover, Paragon argues, Condition 3 orders a "substantial change in the building design," requiring it to submit revised designs of a smaller building to the Board for its review and approval. Paragon claims that this is effectively a requirement to submit a new proposal. It argues that the decision offers no reasonable basis for the reduction from 12 stories to eight, or any requirement as to density or a basis for requiring a redesign of the project.

In reviewing the conditions imposed by the Board to determine if they constitute a *de facto* denial, the Committee must consider whether the Board's decision "manifests a reasonable basis" for the required change. See *Settlers Landing Realty Trust v. Barnstable*, No. 01-08, slip op. at 3-4 (Housing Appeals Committee Order Sept. 22, 2003). Furthermore, a Board may not redesign a Chapter 40B project from scratch. *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. at 3 n.3 (Housing Appeals Committee Jan. 16, 1991). See *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 10 n. 4 (Housing Appeals Committee Jan. 8, 1998) (no de *facto* denial where no fundamental redesign of proposal, no arbitrary limit

to number of housing units and decision responds to "real concerns" brought about by size and topography of site), aff'd, No. 00-P-245 (Mass. App. Ct. Apr. 25, 2002).

In this case the Board has not required a fundamental change of the proposed development. It has not changed the nature of the building proposed by Paragon. Moreover, the reasons recited in the Board's decision for imposing height and setback modifications, as well as parking space specifications, are based on local zoning requirements. Whether these restrictions constitute sufficiently valid local concerns is a question to be addressed in the *de novo* hearing before the Committee. It is enough for the purposes of this motion that the proposed changes do not constitute a fundamental change to the proposal, and the Board's explanations for its conditions are based on current zoning requirements. Accordingly, Paragon's motion for a determination that the Board's decision is *de facto* a denial of a comprehensive permit is hereby denied.

So Ordered.

Housing Appeals Committee

Date: December 1, 2004

Shelagh A. Ellman-Pearl, Esq.
Presiding Officer

Certificate of Service

I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Ruling on Pre-Hearing Motions in the case of Paragon Residential Properties, LLC v. Brookline Zoning Board of Appeals, No. 2004-16, to:

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